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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

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1. This case is here on writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The action, originating in the United States District Court for the Northern District of Georgia, was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and 42 U.S.C. §1981. The question before this Court relates to the denial below of retroactive seniority to certain unsuccessful black applicants for over-the-road driving positions.

The action was brought by Harold Franks, plaintiff, alleging acts of racial discrimination at the company's Atlanta, Georgia, terminal and also alleging as racially discriminatory the company's discharge of Franks at the Atlanta terminal on May 13, 1968 (4a-12a).[1] Subsequently, Johnnie Lee filed an intervenor's complaint alleging that the company was following a racially discriminatory policy and practice of excluding black persons from over-the-road driving jobs. Lee alleged that the company had discriminated against him by denying him employment as a road driver from January to August, 1970, and, after employing him in September, 1970, by discharging him from the company's employ on March 18, 1971 (14a-19a).

The District Court approved a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. It found two classes of black employees at the company's Atlanta terminal, both represented by the plaintiff Franks. The court found a "Class 3" consisting of black applicants for positions as road drivers over the company's entire system, and a "Class 4" consisting of black employees who applied to transfer to over-the-road driving positions. Classes 3 and 4 were represented by the intervenor Lee (Pet. A53, A66-A67).[2]

The District Court found that the company discriminated against the intervenor by refusing to hire him before his actual employment in 1970, and ordered that Lee should recover $6,124.58 from the company as lost wages.[3] The District Court also found that Lee's discharge was not

1. References in this form are to the single appendix filed with petitioners' brief.

2. References in this form are to the appendix to the petition for a writ of certiorari.

3. This amount was paid by Bowman soon after the court's decree.

racially discriminatory, and ordered that he should recover nothing by reason of his discharge (Pet. A59-A64, A70). The Court of Appeals affirmed the judgment of the District Court insofar as it related to Lee's individual claim (Pet. A14, A40). The question before the Supreme Court relates entirely to the class of unsuccessful applicants for road-driving jobs who are purportedly represented by the intervenor Lee. In view of his discharge and the finding adverse to him on the discharge claim, Lee has no personal stake in the question before this Court.

2. By reason of the foregoing facts the dispute between the intervenor Lee and the defendants has been fully resolved. Lee's claim has been litigated to a conclusion, and there is no case or controversy now pending between the intervenor and the company or union. The case therefore is moot. *Board of School Commissioners of the City of Indianapolis* v. *Jacobs*, ... U.S. ....., 43 L.Ed. 2d 74 (1975). Under this Court's ruling in the cited case, where a case or controversy no longer exists between the named plaintiff (the intervenor here) and the defendants, the case is moot unless (1) it was certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, (2) a controversy still exists between defendants and the present members of the class, and (3) the issue in controversy is such that it is capable of repetition yet evading review. See *Sosna* v. *Iowa*, ... U.S. ....., 42 L.Ed. 2d 532 (1975). Although this case was certified as a class action (the element missing in *Board of School Commissioners, supra*), it does not present an issue that is capable of repetition while still evading review. Thus the third element necessary to overcome mootness is clearly absent. Since no other member of this class is asserting a claim, the second element also is apparently missing.

For the foregoing reasons, it is suggested that the case be remanded to the Court of Appeals with instructions to order the District Court to dismiss the intervenor's complaint.

Respectfully submitted,

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